

² The Fund's application for review indicates that "all other jurisdictional issues" are in dispute as well. However, neither the Fund nor respondent put forth any arguments regarding any other issues but the statutory payroll threshold issue when they appeared before the ALJ on June 26, 2008. And the parties' briefs address only the payroll issue.

evidence the ALJ declined to modify his previous order. He specifically stated that he was “unpersuaded by the tax return and the foundation to it provided to [sic] Mr. Dunning.”³

The Fund requests review of whether the respondent has met the payroll requirement of K.S.A. 44-505. The Fund (as well as respondent) maintains that the testimony of respondent’s accountant further bolsters its argument that respondent’s payroll in either of the relevant calendar years was insufficient to trigger application of the Act. Accordingly, the Fund asks the Board to reverse the ALJ’s Order and deny claimant benefits.

Claimant argues that the ALJ’s Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

This is the second time the Board has considered whether respondent met the payroll requirements of K.S.A. 44-505. The recitation of the facts and circumstances surrounding this claim were set forth completely in the Board’s Order of August 16, 2007. In order to avoid an unnecessary restatement of the facts, that statement is hereby adopted and incorporated herein.

Both respondent and the Fund maintain the Act does not apply to this claim because respondent’s payroll does not meet the statutory requirements of the Act. K.S.A. 44-505(a) states in part:

Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

. . .

(2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees **and** wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer’s family by marriage or

³ ALJ Order Nunc Pro Tunc (July 8, 2008).

consanguinity shall be included as a part of the total gross annual payroll of such employer for purposes of this subsection.⁴

The focus of this statutory test is the payroll for the calendar year *before* the accident and the employer's reasonable estimate for the current year's payroll (meaning the year the accident occurred). Here, the accident occurred on January 8, 2007. Thus, the focus is on calendar year 2006 and the respondent's expectation of his business's performance in 2007.

At this claim's first presentation, the ALJ found that respondent met the statutory requirement and ordered the payment of benefits. Following a request for review, one Board Member considered that argument and after reviewing the evidence offered by the parties, affirmed the ALJ. That Board Member offered the following analysis:

Utilizing Claimant's Exhibits 5 and 6 from the preliminary hearing, the Board finds respondent had annual gross wages in excess of \$20,000.00 for the year 2006. In just over 4 and a half months, from August 10 through December 31, 2006, respondent paid over \$14,000.00 in wages to its employees. Additionally, in the first 7 and a half months of 2006, respondent paid over \$6,000.00 in wages, with the total in excess of the \$20,000.00 minimum set by K.S.A. 44-505. Respondent's letter from the accountant regarding the amount of payroll expense for 2005 and 2006 carries little weight. Further explanation regarding how those numbers were determined is required before this unsupported letter would be allowed to influence the Board's decision.⁵

In light of this ruling, the Fund went on to depose the accountant, James E. Dunning, Jr. in the hopes of shedding more light on the source of the information contained within the tax returns. Mr. Dunning's deposition, while lengthy, can be easily summarized. Simply put, Mr. Dunning used the information Jeff Yardley (the respondent) gave him to prepare the tax returns. Mr. Yardley's fiancé (now wife) does the books for the company and she apparently played some part in gathering up this financial information regarding the companies income and expenses, as well as the monies paid to the workers, including claimant.

The deposition also revealed that Mr. Yardley did not provide Mr. Dunning with his cash book which showed actual payments made to the workers in connection with the tax return preparation. When that black book was made available to Mr. Dunning, he was able

⁴ K.S.A. 44-505 (emphasis added).

⁵ Board Order (Aug. 16, 2007) at 8.

to determine that respondent paid over \$20,000 in wages to individuals in 2006.⁶ So, if this cash book is to be believed, the tax returns Mr. Dunning prepared (using the numbers made available to him by respondent and respondent's fiancé/wife) for 2006 underestimated respondent's payroll. This is through no fault of Mr. Dunning as he was merely using the figures provided to him by Mr. Yardley and his fiancé/wife. And when asked, Mr. Yardley has very little recollection of where that figure came from and could not confirm that the tax returns were accurate.⁷

Mr. Yardley clearly did not expect his business to thrive in 2007 and testified that he did not believe that his payroll would exceed \$20,000 in 2007. He explained that in 2006 he benefitted from some severe weather which caused extensive roof damage which drove up demand for his services. But that boom did not continue into 2007.

As noted by the Fund, if respondent's payroll exceeds \$20,000 in 2006 then the Act applies.⁸ This Board Member has considered the evidence and concludes the ALJ's Order Nunc Pro Tunc should be affirmed. As noted before, the evidence is even more supportive of the conclusion that respondent's payroll in 2006 exceeded \$20,000. The accountant's original figure is based on information provided to him, but that figure is directly contradicted by Mr. Yardley's own cash book. Under these facts and circumstances, this Board Member, like the ALJ, finds that the claimant has met his burden of establishing that the Act applies under K.S.A. 44-505.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁹ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order Nunc Pro Tunc of Administrative Law Judge Thomas Klein dated July 8, 2008, is affirmed.

⁶ Dunning Depo. at 43.

⁷ P.H. Trans. (June 26, 2008) at 23.

⁸ Fund's Brief at 4 (filed Aug. 7, 2008).

⁹ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of September 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Terry J. Torline, Attorney for Respondent
Matthew J. Schaefer, Attorney for the Fund
William L. Townsley, Attorney for the Respondent
Thomas Klein, Administrative Law Judge